Are Entire Agreement Clauses Entirely Effective?

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ALTA Conference 2018 – Curtin University 4-7 July 2018

Introduction

Entire agreement clauses have become a standard 'boilerplate' inclusion in most commercial contracts. Designed to merge all parts of the parties' agreement into a single document they are intended to avoid the 'but he said, she said' type arguments about what the parties' actually agreed and whether terms outside the four corners of the written contract were or were not intended to be binding and enforceable.

Over time the courts have gradually eroded the effectiveness of such clauses – finding, for various reasons, that they do not prevent the courts taking into account pre-contractual occurrences (statements and behavior) to enforce rights that cannot be found in the words of the written document.

With the introduction of unfair contract terms legislation in both the *Australian Consumer Law* and the *Australian Securities and Investments Commission Act 2001* (Cth) that erosion has increased and has the potential to increase further. That leaves open the obvious question – are entire agreement clauses (any longer) entirely effective?

Definition

Entire agreement clauses can take a number of forms so an all-encompassing definition is not really possible. However, they all have one thing in common – they all expressly provide that the written agreements in which they invariably appear set out everything to which the parties have agreed and that anything not expressly included in the written contract forms no part of that agreement.

In its most common manifestation entire agreement clauses seek to prevent the parties raising matters discussed during negotiations (but not included in the final written document) to create obligations not detailed in the written contract.

They may, however, also seek to prevent parties alleging that matters that occurred after the formalisation of their agreement in the written document also created new obligations (or varied the already agreed obligations). This is important because standard 'entire agreement' clauses do not preclude post-agreement variations being enforced.

That effect can, however, be achieved in a number of ways, all of which involve, as a minimum, including an express stipulation to the effect that any variation of waiver of the contract will not be binding or effective unless it is in writing and signed by the parties. One of the more effective ways is to include a formal 'zip-up' clause, which normally has two parts – a non-oral modification clause (stipulating that the parties have agreed that their written agreement cannot be orally modified) and an anti-waiver clause (stipulating that the parties have agreed that the written terms cannot be unilaterally varied or waived). An example of such a clause would be 'The terms of this contract may not be varied, amended, modified or waived except by express agreement in writing signed by the parties'.

Care must be taken however, it is quite possible to include a non-oral modification clause in a contract and then nullify its effect by proceeding in ways that indicate that one party has waived the benefit of that clause. See, for example, *Globe Motors Inc v TRW Lucas Variety Steering Ltd* [2016]

EWCA Civ 396, where the court stated that a variation that did not meet the specified requirements or a non-oral modification clause could still be enforceable if the plaintiff could show that the parties had waived the benefit of that clause by, for example, one party engaging in conduct that amounts to a clear representation that it agrees to the variation and the other party then acting on that representation.

Why Include an Entire Agreement Clause?

In common law jurisprudence, it is a well-established rule that the construction of written agreements is a question of law.[1] However, as Lord Hoffman noted in *Carmichael v National Power plc* [1999] 4 All ER 897 at 903:[2]

> '[the rule that the construction of documents is a question of law] applies in cases in which the parties intend all the terms of their contract (apart from any implied by law) to be contained in a document or documents. On the other hand, it does not apply when the intention of the parties, objectively ascertained, has to be gathered partly from documents but also from oral exchanges and conduct. In the latter case, the terms of the contract are a question of fact. And of course the question of whether the parties intended a document or documents to be the exclusive record of the terms of their agreement is also a question of fact.'

Therefore, while ascertaining the meaning of a written contract, *once it has been determined that the parties' agreement is completely contained within the four corners of the written document*, is a question of law, determining whether that contract is in fact all contained within that document is a question of fact.

Consequently, if there is any doubt about whether the parties' 'entire agreement' is in fact contained within the confines of the written document the courts are entitled to look to matters outside the document – including everything that was said or done during negotiations as well as all the circumstances surrounding the agreement.

That of course leaves open the door to a determination that the agreement was not, in fact, fully contained within the written document but was partly written and partly oral, was subject to one or more unrecorded but implied terms, was accompanied by some 'collateral' agreement which may also be enforced – or that it was otherwise affected by something that could either limit or expand the parties' rights.

The insertion of an 'entire agreement' clause is intended to prevent that wider investigation by removing any doubt about what the parties intended their agreement to be. It is intended to ensure that, in the event of a dispute, the courts are precluded from considering matters outside the four corners of the document and that they are restricted to considering the words of the document itself when they are determining what the parties' agreed rights, duties and obligations are.

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[1] *Pioneer Shipping Ltd v BTP Tioxide Ltd ('The Nema')* [1982] AC 724 at 736: '… in English jurisprudence, as a legacy of the system of trial by juries who might not all be literate, the construction of a written agreement, even between private parties, became classified as a question of law. The object sought to be achieved in construing any commercial contract is to ascertain what were the mutual intentions of the parties as to the legal obligations each assumed by the contractual words in which they (or brokers acting on their behalf) chose to express them; or, perhaps more accurately, what each would have led the other reasonably to assume were the acts that he was promising to do or to refrain from doing by the words in which the promises on his part were expressed'.

[2] *Carmichael v National Power plc* [1999] 4 All ER 897 at 903 (referencing *Garwood v Moore* (1849) 4 Exch 681; 154 ER 1388).

Purpose

Therefore entire agreement clauses are intended to and to give the parties' contract a degree of finality by merging all aspects of their agreement into a single document which the parties also expressly agree supercedes and overrides all prior aspects of their agreement.

That is, such clauses set out clearly, and once and for all, that the parties' entire agreement is to be found solely within the confines of the written document. Their clear purpose is to obviate and remove the necessity of the parties having to demonstrate, in the event of a subsequent dispute, that nothing else said or done in the lead up to the contract was intended by them to form part of their final bargain.

That purpose was expressed, perhaps more colourfully, by Lightman J in *Inntrepreneur Pub Co v East Crown Limited* [2000] 2 Lloyd's Rep 611 at 614 where he said:

> 'The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding, in the course of negotiations, some (chance) remark or statement (often long-forgotten or difficult to recall or explain) upon which to found a claim, such as the present, to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search, and the peril to the contracting parties posed by the need that may arise in its absence to conduct such a search'.

Kirby P applied much the same reasoning in *State Rail Authority of New South Wales v Heath Outdoors Pty Ltd* (1986) 7 NSWLR 170 at 177, when discussing the operation of both the parol evidence rule and entire agreement clauses, saying that both were intended to prevent the courts having to engage in, 'a minute examination of the wilderness of pre-contract conversations'.

Each therefore recognises that the parties can discuss many things during negotiations but that they may not intend everything they discuss to become part of what they ultimately agree. That is, they may not intend everything they discuss to become enforceable terms of their eventual contract.

Indeed, as was submitted in *Arnot v Hill-Douglas* [2006] NSWSC 429 at [78], the purpose of entire agreement clauses is 'to ensure that commercial litigation does not get bogged down in the "wilderness of pre-contractual conversations" and communications, which threaten the stability of commercial dealings and the primacy of the written document.'

What entire agreement clauses *do not* do, however, is to act as exclusion clauses. Their intent is not to exclude or limit a party's liability for breaching a term that has in fact been agreed; their intent is to deny that the 'term' alleged to have been breached was ever an agreed term at all.[3]

The Problems

The problem with entire agreement clauses though is twofold:

a. to determine what weight the courts will attach to them as assertions of the true nature and extent of the parties' agreement; and

b. to determine the extent to which they can prevent the courts considering other evidence to determine the existence of matters other than the terms of the agreement.

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[3] *Inntrepreneur Pub Co v East Crown Limited* [2000] 2 Lloyd's Rep 611 and *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317 at [40] per Chadwick LJ.

1 What Weight the Courts Will Attach to Them as Binding Statements of Finality

A major issue with entire agreement clauses, especially those that have been included as 'boilerplate provisions' in standard form contracts of adhesion, is that the courts approach them much as they do exemption clauses. That is, they accept that if they are in fact expressions of the parties' true agreement they must be enforced – though there is often a degree of reluctance based on some level of scepticism about the extent to which they are, in fact, true statements of the parties' intent.[4]

There is also no real consensus about the exact manner in which they should be treated. That was made quite clear by Allsop J in *Branir v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 where he said at [440]:

> Whilst "entire agreement" clauses have sometimes received separate treatment as a genus, leading to an approach, as evidenced by the appellants' submissions here, that there is a rule of law related individually to them, it seems to me that they only reflect the epitome of the operation of the parol evidence rule. The parties have merely expressly avowed that the totality of the contract, *about the relevant subject matter*, is to be found within the four corners of the document.

The baseline approach then appears to be that the courts will recognise and apply such provisions as they do all other terms of the contract – assuming that they are valid and enforceable expressions of the parties' intent *unless* there is clear evidence that that is not so – as could be the case if agreement was obtained by, for example, misrepresentation, mistake or through duress, undue influence or unconscionable conduct.

Accordingly, it is to be expected (and it is the case) that such clauses will be construed strictly and contra proferentem and, like the parol evidence rule, will be applied with a weather-eye to a range of now well-recognised exceptions – unless the clauses (and any agreed 'add-ons') also expressly address (and exclude) them.

However, there are also a number of other considerations that the courts will take into account in making that determination including:

a. whether the term was expressly agreed or simply included as a 'boilerplate provision' in a standard form contract. This is because as Lord Bingham noted in *Hombourg Houtimport BV v Agrosin Private Ltd, The Starsin* [2004] 1 AC 715 at [9]-[12] (emphasis added):

> **'9** When construing a commercial document in the ordinary way the task of the court is to ascertain and give effect to the intentions of the contracting parties. … But there are a number of rules, some of very long standing, which give valuable guidance.
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> **10** First is the rule … "that a business sense will be given to business documents".[5] …

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[4] Gerard McMeel, 'Construction of contracts and the role of 'entire agreement' clauses' (2007) 3(1) *Capital Markets Law Journal* 58 at 65. For an example of that approach see Diplock J in *Lowe v Lombock Ltd* [1960] 1 All ER 611 at 616: 'clause 9(ii) is clearly an attempt, which only the size of the print in which it is set out prevents one calling blatant, to evade the provisions of section 8(2) and (3) of the *Hire-Purchase Act 1938'*.

[5] See also Gleeson CJ in *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at [8] (emphasis added):

> 'In giving a commercial contract a businesslike interpretation, it is necessary to consider the language used by the parties, the circumstances addressed by the contract, and the objects which it is intended to secure. An appreciation of the *commercial purpose of a contract* calls for an understanding of the genesis of the transaction, the background, and the market. This is a case in which the Court's general understanding of background and purpose is supplemented by specific information as to the genesis of the transaction. The Agreement has a history; and that history is part of the context in which the contract takes its meaning'.

> **11** Secondly, it is common sense that *greater weight should attach to terms which the particular contracting parties have chosen to include in the contract than to pre-printed terms probably devised to cover very many situations to which the particular contracting parties have never addressed their minds*.[6] …
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> **12** Thirdly, … [the] court must … construe the whole instrument before it in its factual context, and cannot ignore the terms of the contract. But it must seek to give effect to the contract as intended, so as not to frustrate the reasonable expectations of businessmen. …'[7]

b. whether the contract containing it was signed. If it was, it is more likely that the entire agreement clause will be upheld. That principle was well illustrated in *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, the case most normally cited as authority for the legal effect of signature. The contract that Mrs L'Estrange had signed (albeit without reading it) contained an entire agreement clause which read:

> 'This agreement contains all the terms and conditions under which I agree to purchase the machine specified above and any express or implied condition, statement of warranty, statutory or otherwise not stated herein is hereby excluded'.

That clause was held to effectively exclude the *Sale of Goods Act's* otherwise applicable implied condition of fitness for purpose - at least in part because Mrs L'Estrange's had signed the contract containing it without demur.

c. whether the parties were represented in negotiations. If so, it is more likely that the clause, even in a standard form contract, will be upheld, particularly if the parties were also experienced business people of equal bargaining power.[8]

d. whether the contract is capable of being rescinded because of some defect in its formation as would be the case if some vitiating factor affected that formation. If so, neither party will be

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[6] Citing 'the classical statement of this rule by Lord Ellenborough in *Robertson v French* (1803) 4 East 130, 136, cited with approval by Lord Halsbury in *Glynn v Margetson* [1893] AC 351, 358 and by Scrutton LJ in *In re an Arbitration between L Sutro & Co and Heilbut, Symons & Co* [1917] 2 KB 348, 361–362'.

[7] See also *Zhu v Treasurer of the State of New South Wales* (2004) 218 CLR 530 at [82]:

> It was necessary to construe the [contract] so as to avoid it making commercial nonsense or working commercial inconvenience. Its commercial purpose – the purpose of reasonable persons in the position of [the parties] – was relevant. That, in turn, required attention to "the genesis of the transaction, the background, the context, the market" in which the parties were operating, as known to both parties

In this context note also Lord Ellenborough's statement in *Robertson v French* (1803) 4 East 130, 136, cited with approval by Lord Halsbury in *Glynn v Margetson* [1893] AC 351, 358 and by Scrutton LJ in *In re an Arbitration between L Sutro & Co and Heilbut, Symons & Co* [1917] 2 KB 348, 361–362:

> '[an instrument] is to be construed according to its sense and meaning as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary and popular sense unless they have generally in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must, in the particular instance and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense.

[8] *EA Grimstead & Son Ltd v McGarrigan*, [1999] All ER (D) 1163 per Chadwick LJ (emphasis added): 'There are, as it seems to me, at least two good reasons why the courts should not refuse to give effect to an acknowledgement of non-reliance in a commercial contract *between experienced parties of equal bargaining power – a fortiori, where those parties have the benefit of professional advice*. …' See also *GMAC Commercial Credit Development Ltd v Sandu* [2004] All ER (D) 589 at [109] and *Peart Stevenson Associates Ltd v Holland* [2008] EWHC 1868 at [39].

able to rely on the entire agreement clause because it, together with the rest of the contract, will be of no force and effect (a situation which gives rise to an interesting 'chicken and egg argument' if the entire agreement clause is well-drafted and comprehensive in its coverage; if so, it could preclude admission of the evidence required to prove the vitiating element which, if proven, would invalidate the entire agreement clause – which leads us to the second problem with entire agreement clauses).

2 The Extent to Which Entire Agreement Clauses Preclude Evidence of Other Matters

A properly drafted entire agreement clause may well prevent a contract being held to be partly written partly oral, thereby removing the possibility that any 'oral terms' will also be enforced. Whether it will also prevent evidence being accepted to show, for example, that the agreement should be rescinded (or that other relief should be granted), because it was induced by misrepresentation or affected by some other vitiating factor, or that some implied term or collateral warranty or other pre-contractual 'promise' should also be enforced (through an estoppel plea) will depend on the courts' interpretation of the scope of the clause and its willingness to limit it to the express terms of the agreement.

The Effect on of Entire Agreement Clauses on Misrepresentation

As Lightman J noted in *Inntrepreneur Pub Co v East Crown Limited* [2000] 2 Lloyd's Rep 611 at 614 (EGLR 33):

> 'an entire agreement provision does not preclude a claim in misrepresentation. For the denial of contractual force cannot affect the status of a statement as a misrepresentation'.

That is, while an entire agreement clause may quite validly deny that an earlier non-included statement was intended to become (or has become) a term – it does not normally deny that it was made, or that it was relied on by the party to whom it was made.

Therefore, an entire agreement clause, by itself, merely stating that the written document contains the parties' entire agreement, will not prevent the courts from accepting evidence to show that that agreement was obtained as the result of misrepresentation and, if warranted, from then permitting the victim of the misrepresentation to rescind the contract and escape the obligations it imposes.

However, as Lightman J also noted in the same case at 614:

> 'The same clause in an agreement may contain both an entire agreement provision and a further provision designed to exclude liability, eg for misrepresentation or breach of duty'.

Such clauses, excluding liability for misrepresentation, are commonly referred to as 'non-reliance clauses'. They expressly stipulate that, in their decision to contract, the parties did not rely on anything that was said or done prior to the agreement – thereby effectively denying the key element of 'reliance' that is required for any misrepresentation plea to succeed.

Echoing Lightman J's earlier comments, Young CJ in Eq explained the reason for the inclusion of non-reliance clauses to augment entire agreement clauses in *Arnot v Hill-Douglas* [2006] NSWSC 429 at [87], saying: 'There is a distinction between a formed contract and a misrepresentation prior to contract. It is quite possible to exclude reliance on representations …'[9]

[9] See also *EA Grimstead & Son Ltd v McGarrigan* [1999] All ER (D) 1163 per Chadwick LJ: 'There are, as it seems to me, at least two good reasons why the courts should not refuse to give effect to an acknowledgement of non-reliance in a commercial contract between experienced parties of equal bargaining power – a fortiori,

Such clauses could be worded in a range of ways. As in *ACCC v Seal-A-Fridge Pty Ltd* (2010) 268 ALR 321; [2010] FCA 525 (see at [48]) they can be something like:

> 'The parties acknowledge that they have not been induced to enter into this agreement in reliance on, nor as the result of, any statements, representations, warranties, promises or inducements whatsoever, whether written of oral and whether directly related to the contents hereof or collateral thereof made by either of them or their officers, directors, employees or agents'.

Alternatively, they may be more economically worded, as was the case in *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317 (see at [38]), where the clause read simply:

> 'no statements or representations made by either party have been relied upon by the other in agreeing to enter into the contract'.

If such a clause is included alongside a 'standard' 'entire agreement' clause it can effectively exclude liability for misrepresentation under the general law – because it expressly states that the parties have not relied on pre-contractual conduct in their decision to contract. Chadwick LJ described their effect in *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317 at [40] (emphasis added):

> 'It is true that an acknowledgement of non-reliance does not purport to prevent a party from proving that a representation was made, nor that it was false. What the acknowledgement seeks to do is to prevent the person to whom the representation was made *from asserting that he relied upon it*'.

However, if the parties (or one of them) propose to include a provision, either in the clause containing the entire agreement provision or in a quite separate clause excluding liability for misrepresentation, that intent must be clearly stated.

See, for example *AXA Sunlife Services plc v Campbell Martin Ltd* [2011] 2 Lloyd's Rep 1; [2011] EWCA Civ 133 where the contract contained an entire agreement clause which provided, in part, that 'this Agreement shall supercede any prior promises, agreements, representations, undertakings or implications … relating to the subject matter of this Agreement'. AXA argued that that part of the clause excluded liability for misrepresentation.

The Court rejected that argument, Rix LJ noting at [82] that (emphasis added):

> In these circumstances, I would be inclined, subject to authority, to regard cl 24 as being *concerned only with matters of agreement, and not with misrepresentation at all.* The essence of agreement is that it is concerned with matters which the parties have agreed. *The essence of misrepresentation, however, is that it is not concerned with what the parties have agreed, but rather with inaccurate statements (innocently, negligently or fraudulently inaccurate statements) which have been made by one party to the other, have been relied on by the representee in entering into their agreement, and which may give the representee rights to rescind that*

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where those parties have the benefit of professional advice. First, it is reasonable to assume that the parties desire commercial certainty. They want to order their affairs on the basis that the bargain between them can be found within the document which they have signed. They want to avoid the uncertainty of litigation based on allegations as to the content of oral discussions at pre-contractual meetings. Second, it is reasonable to assume that the price to be paid reflects the commercial risk which each party - or, more usually, the purchaser - is willing to accept. The risk is determined, in part at least, by the warranties which the vendor is prepared to give. The tighter the warranties, the less the risk and (in principle, at least) the greater the price which the vendor will require and which the purchaser will be prepared to pay. It is legitimate, and commercially desirable, that both parties should be able to measure the risk, and agree the price, on the basis of the warranties which have been given and accepted.'

*agreement and/or claim tortious or quasi-tortious damages by reason of loss arising out of entering into the agreemen*t. In a clause therefore in which three parts are plainly concerned only with agreement, including two other parts of the self-same sentence, and in which all the other sibling words in the critical part (iii) are words of agreement, and where the critical single word 'representations' (not *mis*representations) is likely in context to refer to representations which might be argued, but for the clause, to have become *terms* of the agreement, and where the other important word, 'supersede' is essentially a word of agreement rather than exclusion, I would thus provisionally conclude that misrepresentation and the exclusion of misrepresentation or liability for it are simply not the business of the clause at all.

Further, even if the clause does explicitly (and effectively) deny reliance on misrepresentations in the course of negotiations, if one party does in fact know that the other is relying on a pre-contractual representation it is possible that any non-reliance clause will not then be effective (because of contractual estoppel).

It is here that the wording of the clause is critical.

If the clause states that one party 'has not relied on any prior representation' and the other knows that in fact it has so relied, the clause may well not have the desired effect of preventing the courts from considering and providing remedies for the misrepresentation. This is because of the principle articulated by the Court of Appeal in *Lowe v Lombank Ltd* [1960] 1 All ER 611; [1960] 1 WLR 196 at 205, that where a false statement is made about a matter of past fact, that statement cannot operate either as an estoppel by representation or (where the fact is expressed as an agreement) a contractual estoppel, unless:

(a) there was a clear and unambiguous statement;

(b) the plaintiff meant it to be acted upon by the defendant, or, at any rate, so conducted himself or herself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it; and

(c) the defendant did in fact believe it to be true and was induced by such belief to act upon it.

As Chadwick LJ later said in *Watford Electronics Ltd v Sanderson CFL Ltd* at [40]:

> 'That may present insuperable difficulties; not least because it may be impossible for a party who has made representations which he intended should be relied upon to satisfy the court that he entered into the contract in the belief that a statement by the other party that he had not relied upon those representations was true'.

See also *E A Grimstead & Son Ltd v McGarrigan* [1999] All ER (D) 1163, *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386; [2006] 2 Lloyd's Rep 511, *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWCH 1186 Comm at [537]-[569] and *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2008] EWHC 1686 (Comm) at [36].

The effect of the principle in *Lowe v Lombank Ltd* is that, in most cases, the fact that the clause was inserted by the proferens for its own benefit means that, irrespective of how clear and unambiguous the clause is, it will be almost invariably be difficult for the proferens to assert either that the other party, as the nominal maker of the statement, 'intended it to be taken and relied upon' or that the proferens either 'believed it to be true' or 'in fact relied upon it'.

However, if the clause simply denies that any representations were made to induce the contract (even if that is untrue), that will preclude the court from finding that the contract was induced by misrepresentation – and rescission and the allied tortious remedies will not be available. As Aikens J said in *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2008] EWHC 1686 (Comm) at [36] (emphasis added):

Here the parties agree that no representation was made at all. FFCL has agreed with Trident that a state of affairs is the case, ie that there were no pre-contract (non-fraudulent) representations by Trident. More importantly, the parties agree that this state of affairs is to form the basis of the transaction. *Even if it was not in fact the case that there had been no representations, the parties are free to agree that it was so and base their contractual relations on that state of affairs*, for the reasons that Moore-Bick LJ sets out in the *Peekay* case at para 56.

Effect of Entire Agreement Clauses on Pleas of Misleading or Deceptive Conduct

If the misrepresentation amounts to misleading or deceptive conduct under some statutory provision (including but not limited to the Australian Consumer Law) an entire agreement clause, by itself, will not exclude liability for that behaviour. The High Court made that clear in *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, Gummow, Heydon, Hayne and Kiefel JJ saying, at [130] (emphasis added):

> '… of itself, neither the inclusion of an entire agreement clause in an agreement nor the inclusion of a provision expressly denying reliance upon pre-contractual representations will necessarily prevent the provision of misleading information before a contract was made constituting a contravention of the prohibition against misleading or deceptive conduct by which loss or damage was sustained. As pointed out earlier, by reference to the reasons of McHugh J in *Butcher* [referring to *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [109]]*, whether conduct is misleading or deceptive is a question of fact to be decided by reference to all of the relevant circumstances, of which the terms of the contract are but one*'.

However, implicit in that is that the courts will take any entire agreement clause into account when determining whether one party was, in fact, induced to enter into the contract because of the misleading or deceptive conduct. As French CJ noted in *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 saying, at [31] (emphasis added):

> Where the impugned conduct comprises allegedly misleading pre-contractual representations, a contractual disclaimer of reliance will ordinarily be considered in relation to the question of causation. *For if a person expressly declares in a contractual document that he or she did not rely upon pre-contractual representations, that declaration may, according to the circumstances, be evidence of non-reliance and of the want of a causal link between the impugned conduct and the loss or damage flowing from entry into the contract*. In many cases, such a provision will not be taken to evidence a break in the causal link between misleading or deceptive conduct and loss. The person making the declaration may nevertheless be found to have been actuated by the misrepresentations into entering the contract. The question is not one of law, but of fact.

See also *Warwick Entertainment Centre Pty Ltd v Alpine Holdings* (2005) 224 ALR 134 at [59]-[60]:

> … In the case of a claim arising out of a contravention of s 52 of the Act [a reference to the *Trade Practices Act 1974* (Cth)] the relevant question, in this context at least, is always one of reliance or inducement. If, as a result of misleading conduct, a person is induced to enter into a contract and suffers loss, the right to a remedy will subsist whatever the parties may provide in their agreement[10] … when the agreement to lease was signed by the respondents, they were unaware that they had been misled and, as the trial Judge found, they relied upon the appellants' misleading conduct in entering into that contract. Consequently, their cause of action is not precluded by anything contained within cls 20.1 and 20.2.

[10] Citing *Clark Equipment Australia Ltd v Covcat Pty Ltd* (1987) 71 ALR 367 at 371; *Petera Pty Ltd v EAJ Pty Ltd* (1985) 7 FCR 375 at 378 and *Oraka Pty Ltd v Leda Holdings Ltd* (1997) ATPR 41-558 at 43,717.

It therefore seems that an entire agreement clause can be pleaded as evidence that there was, in fact, no reliance on any 'misleading or deceptive' pre-contractual conduct and that the sole effect of having an entire agreement clause, in instances where there is an allegation of misleading or deceptive conduct, is to increase the onus of proof on the plaintiff to show reliance. As Einstein J put it in *Chint Australia Pty Ltd v Cosmoluce Pty Ltd* [2008] NSWSC 635 at [126]:

> In relation to claims under the *Trade Practices Act* the effect of an 'entire agreement' clause is to heighten the burden Cosmoluce bears in proving reliance on the relevant misrepresentation: see *Leda Holdings Pty Limited v Oraka Pty Limited* (1998) ATPR ¶ 41-061 at 40,515 – 40-516 (FCAFC), *Poulet Frais Pty Limited v The Silver Fox Company Pty Limited* (2006) 220 ALR 221 at [75] – [81].

The wording of such clauses therefore becomes important – as does the manner in which they are inserted into the contract. As indicated earlier, if they are simply part of a standard form pre-printed contract of adhesion it is less likely that they will be seen to be as French CJ noted in *Campbell v Backoffice Investments Pty Ltd*, an express declaration that the affected party 'did not rely upon pre-contractual representations'.

Effect of Entire Agreement Clauses on Implied terms

As a basic proposition an entire agreement clause will not preclude the courts implying a term unless the agreement expressly and clearly excludes its implication. See *Hart v MacDonald* (1910) 10 CLR 417 (below); *Etna v Arif* [1999] 2 VR 353; *Eagle v Delta Haze Corporation* [2000] VSC 513; *Alstrom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2001] SASC 49 at [125]*Insight Oceania Pty Ltd v Philips Electronics Australia Ltd* [2008] NSWSC 710 at [158], *GEC Marconi Systems v BHP Information Technology* (2003) 128 FCR 1; [2003] FCA 50 at [922] and *ACCC v Seal-A-Fridge Pty Ltd* (2010) 268 ALR 321; [2010] FCA 525 at [114].[11]

As Finn J noted in *GEC Marconi Systems v BHP Information Technology* (2003) 128 FCR 1; [2003] FCA 50 at [922]:

> … (i) I consider the law in this country to be that an "entire agreement" clause does not preclude implications ad hoc: see *Etna v Arif*, above; so that I cannot, with respect, agree with the view to the contrary expressed in *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at [387]; and (ii) I find arresting the suggestion that an entire agreement clause is of itself sufficient to constitute an "express exclusion" of an implied duty of good faith and fair dealing where that implication would otherwise have been made by law.

Similarly, in *ACCC v Seal-A-Fridge Pty Ltd* (2010) 268 ALR 321; [2010] FCA 525 the Full Federal Court noted at [114]*:*

> Just to regard the franchise agreement as including an oral term that the franchisee will pay a weekly fee of $50 to Seal-A-Fridge in respect of the 13 number would not though, in my opinion, carry fully into effect the intentions of the parties to that agreement. … Thus, the oral term providing for a weekly fee of $50 should be regarded as being supplemented by an implied term

[11] There is some authority to the contrary; see *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at [387] – though it seems to be based on an erroneous application of comments in *Hope v RCA Photophone of Australia Pty Ltd* (1937) 59 CLR 348 by Latham CJ at 357-358 and Dixon J at 363; they support the proposition that a properly worded clause can exclude the implication of an implied term – not that any entire agreement clause will do so. (The decision was reversed on other grounds: see *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90).

> providing for its increase in a way that would give business efficacy to the franchise agreement: *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 292.

See also *Alstrom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2001] SASC 49 at [125]:

> However, neither this principle [that, whilst the Court should avoid absurdity and inconsistency, it should go no further in construing the words used by the parties] nor an "entire contract" clause will prevent the implication of terms where that is necessary to give effect to the contract's true intent and purpose.

However, as was also noted in *Alstrom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2101] SASC 49 at [125] if terms are to be implied by the court it can only be on the five principles enunciated by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 282-283

Intrinsic v Extrinsic Implied Terms

In *AXA Sunlife Services plc v Campbell Martin Ltd*, AXA had argued that the entire agreement clause there also excluded the possible implication of terms into the parties' agreement (ie it argued that by specifying that the parties' entire agreement was contained in the written contract it necessarily excluded the inclusion of other terms, not only because they had been raised during negotiations, but also because they could be implied on any of the standard tests). The Court held that it did not.

Stanley Burnton LJ at [41] said (emphasis added):

> None of the orders specifies the basis for the implication of the terms alleged by the defendants. It is apparent, however, that the defendants allege that they are to be implied in order to give business efficacy to the agreements. In other words, the implied terms are said to be *intrinsic to the agreements*, and true implications. In my judgment, such terms, if otherwise to be implied, are not excluded by cl 24. *As intrinsic provisions of the agreement, they are within the expression 'This Agreement and the Schedules and documents referred to herein'* in the first sentence, and they are not 'prior' to the agreement, and therefore are unaffected by the second sentence. The agreement might have included, but does not include, an express specific exclusion of such implied terms.

Implicit in this reasoning though are two considerations: first, that even if terms may be regarded as 'intrinsic' to the parties' agreement they can still be excluded by an appropriately worded specific exclusion and, second, that implied terms that are not 'intrinsic' to the agreement could in fact be precluded by a generally applicable entire agreement clause.

The underlying reasoning (that terms intrinsic to the parties' agreement will not be excluded by a general entire agreement clause) was also applied in *Etna v Arif* [1999] 2 VR 353 which held that an entire agreement clause did not preclude the implication of a term which would otherwise be implied. In that case a clause stating that the written contract was the sole repository of the agreement' and that there were 'no terms … which have been relied upon by the Purchaser in entering into this contract other than those included in this contract' was held not to preclude the 'implication of a term which is otherwise to be implied'.

As with misrepresentation though, if an entire agreement clause is to be effective to exclude the application of an implied term, its words must very clearly state that purpose. See, for example, *BAE Systems Australia v Cubic Defence New Zealand* (2011) 285 ALR 596; [2011] FCA 1434.

In that case the defendants had argued that an entire agreement clause precluded the implication of the prevention principle and the duty of co-operation.[12] The Court held that it did not because it was not worded widely enough. As Bersanko J said at [63]-[65]:

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[12] The prevention principle was described at [55] et seq as follows:

[63] The leading case is *Hart v MacDonald* (1910) 10 CLR 417 ('*Hart v Macdonald*'). That case involved a contract for the erection of a dairy plant and butter factory. A term of the contract between the parties was as follows:

> It is to be understood that there is no agreement or understanding between us not embodied in this tender and your acceptance thereof.

[64] The High Court held that the entire agreement clause did not preclude the implication of a term of the contract. Griffith CJ said (at 421):

> The application of that rule is not affected by the inclusion in the contract of the term I have read, that it is to be understood that there is no agreement or understanding not embodied in the tender. A contract to the effect stated in the first count of the declaration arises by necessary implication upon a proper construction of the express words.

Isaacs J said (at 430):

> The agreement contains this provision: 'It is to be understood that there is no agreement or understanding between us not embodied in this tender and your acceptance thereof.' It was urged that this provision excluded implications. But that is not so. *It excludes what is extraneous to the written contract: but it does not in terms exclude implications arising on a fair construction of the agreement itself, and in the absence of definite exclusion, an implication is as much a part of a contract as any term couched in express words*.

65 I recognise that the terms of clause 1.4 of the Subcontract are different from the terms of the clause considered by the High Court in *Hart v MacDonald*. Nevertheless, assuming for the purposes of argument that the prevention principle and the duty of cooperation may be excluded by express words of a contract, those words would need to be very clear before a court held that that result had been achieved. The words of clause 1.4 are not so clear as to achieve that result. It seems to me that clause 1.4 precludes reliance on representations,

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[55] In *Stirling v Maitland* (1864) 5 B & S 840 at 852 Lord Cockburn CJ described what I have referred to as the prevention principle in the following terms:

> I look on the law to be that, if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative. I agree that if the Company had come to an end by some independent circumstance, not created by the defendants themselves, it might very well be that the covenant would not have the effect contended for; but if it is put an end to by their own voluntary act, that is a breach of covenant for which the plaintiff may sue. The transfer of business and dissolution of the Company was certainly the act of the Company itself, so that they have by their act put an end to the state of things under which alone this covenant would operate.

[56] The prevention principle has been described as the negatively expressed duty of co-operation: *Australis Media Holdings Pty Ltd v Telstra Corporation Ltd* (1998) 43 NSWLR 104 at 123.

[58] As to the duty of cooperation, Lord Blackburn said in the leading case of *Mackay v Dick* (1881) 6 App Cas 251 at 263:

> I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances.

statements, advices or information extraneous to the contract, but not implied terms of the nature alleged by the applicant.

For an example of a clause that was sufficiently clear to exclude the implication of an implied term (in that case because of trade custom or usage), see *Exxonmobil Sales and Supply Corp v Texaco Ltd* [2003] EWHC 1964 where the clause provided that the contract 'contains the entire agreement of the parties … and there is no other promise, representation, warranty, *usage or course of dealing* affecting it'. It was held that the clause was effective to exclude a term based on custom or usage to the effect that samples taken by an expert to determine whether oil shipped met contract specifications would be held for a reasonable time even though there was sufficient evidence of such a custom.

Statutorily Implied Terms

Also as with the link between misrepresentation and the statutory 'misleading or deceptive conduct' provisions, an entire agreement clause could not preclude the implication of non-excludable statutorily implied terms (such as the consumer guarantees in the Australian Consumer Law) – though they could of course, if appropriately worded, exclude implied terms such as those in the Sale of Goods Acts where the Act itself permits their express exclusion. See, for example *L'Estrange v F Graucob Ltd* (above).

Effect on of Entire Agreement Clauses on Collateral Warranties

In Australia, an alleged collateral contract cannot be inconsistent with the terms of the main contract, at least where the two agreements are between the same parties. That is, the alleged collateral contract cannot vary or contradict the terms of the main contract in any way. Dixon CJ explained the relevant principle in *Maybury v Atlantic Union Oil Co Ltd* (1953) 89 CLR 507 at 517 saying:

> A collateral agreement made in consideration of a main agreement cannot effectively subsist unless it is consistent with the main agreement. Once an agreement is made in writing it is treated, unless the parties are shown otherwise to intend, as the full expression of their obligations. If it is established that the writing was intended to contain only part of a fuller agreement it may be otherwise.

That limitation can even extend to situations where the main contract contains an 'entire agreement' clause because the effect of such clauses is, as Lightman J put it in *Inntrepreneur Pub Co (GL) v East Crown Ltd* [2000] Lloyd's Rep 611 at 613, 'to denude what would otherwise constitute a collateral warranty of legal effect'. That is, if the parties clearly and expressly state that the main contract contains their 'entire agreement' the courts should not incorporate (or enforce) anything else – either as part of that agreement or as part of a separate collateral contract.

However, if an 'entire agreement' clause is to have that effect it must be clear that that is what was intended – and that will always depend on what a reasonable person, knowing all of the background to the parties' agreement, would believe. See, *McMahon v National Foods* (2009) 25 VR 251 at [38]-[41] per Nettle JA (emphasis added):

> [38] But, as was observed by Peden and Carter in an article entitled *Entire Agreement – and Similar – Clauses*,[13] because proof of a collateral contract is an exception to the parol evidence rule*, a merger provision should not be permitted to stand in the way of proof of a collateral contract unless the merger provision is clearly expressed to have that effect*. I do not consider that

[13] (2006) 22 JCL 1, 7.

clause 33 is sufficiently clearly expressed to have the effect of preventing proof of the collateral contract for which the McMahons contended.

[39] It seems that the view which has been taken in England is that a merger provision should generally be treated as applying to agreements which might otherwise operate as collateral contracts.[14] And at one level, the logic of that approach is appealing. If business persons were asked as a matter of principle what is meant by an entire agreement clause, they would probably reply that it means what it says. Shorn of surrounding circumstances, the idea that an entire agreement clause should not be taken to extend to a collateral contract because the latter is a separate contract would possibly be thought of as quaint. But lawyers must beware of generalities. In an age of contractual development which puts contextual interpretation ahead of formalism, each case is unique. *The question in each case is what the merger clause in question 'would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract'*.[15] And so, as Peden and Carter conclude:

> Ultimately, the resolution of the issue must depend on intention as to the scope of the entire agreement clause. Arguably, if the clause refers expressly to collateral contracts that should be sufficient statement of intention that a collateral contract may not be put forward [as] an additional express term of the bargain. But if there is no express reference to collateral contracts, it seems odd to regard a clause in the main agreement as effective to prevent enforcement of the collateral contract. At least in cases where the alleged collateral contract was contemporaneous with the main contract, it would seem logical to infer that the parties intended the collateral contract to operate because otherwise the very reason why one party entered into the main contract- the willingness of the other to enter into the collateral contract – would count for nothing.[16]

[40] I do not overlook that a statement must be promissory in order to amount to a collateral contract, and that courts in this country have been reticent about treating pre-contractual statements as promissory.[17] But as the judge seems to have found, the circumstances here tend to imply that the statements were promissory. In my view, too, it is likely that the statements were intended to be relied on and were in fact relied on by the McMahons or, to put it more accurately, that is the proper conclusion objectively to be discerned.

[41] It is true, as counsel for the respondent submitted, that allegations of collateral contract have often been dismissed on the basis that, if the parties truly intended the alleged collateral promise to be binding, they would have set it out in their written agreement. But that is not a principle of law. The test is what was said and done and how it would be discerned objectively – and the fact is that business people are not infrequently inclined to trust other business persons who make promises to them to the point that they do not insist upon having those promises reduced to writing. If such situations are to be looked at objectively with an informed knowledge of all of the circumstances, the honest and

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[14] Citing *Inntrepeneur Pub Co (GL) v East Crown Ltd* [2000] 2 Lloyd's Rep 611, 614; *Deepak Fertilisers and Petrochemicals Corp v ICI Chemical & Polymers Ltd* [1999) 1 Lloyd's Rep 387; and see Mitchell, Entire Agreement Clauses: Contracting Out of Contextualism (2006) 22 JCL 3, 222.

[15] Citing *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2002) 210 CLR 181,188.

[16] (2006) 22 JCL 1, 8.

[17] Citing *JJ Savage & Sons Pty Ltd v Blakney* (1970) 119 CLR 435, *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1; Seddon and Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 9th Aust Ed [10.6]; *Shepperd v Council of Ryde* (1952) 85 CLR 1, 13; *Futuretronics International Pty Ltd v Gadzhis* [1992] 2 VR 217, 232; *Nassif v Fahd* [2007] NSWCA 269, [28] (Bryson AJA).

> reasonable business person observer may not hesitate to conclude that a deal had been done.

Effect of Entire Agreement Clauses on Applications for Rectification

If the parties to a contract reach agreement and then draw up a written document which, by mistake, fails to record that agreement accurately, the court may rectify the document by ordering that the mistaken portion be struck out and replaced with words that do reflect what they actually agreed.

Rectification is an equitable remedy and it is granted because it would be 'unconscientious' to allow one party to enforce a written contract that he or she knows does not accurately record their common contractual intention. As Campbell JA put it in *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 at [444]:

> when a plaintiff succeeds in a claim for rectification, the plaintiff is found to have been justified in effect saying to the defendant "you and I both knew, when we entered this contract, what our intention was concerning it, and you cannot in conscience now try to enforce the contract in accordance with its terms in a way that is inconsistent with our common intention".

Consequently, rectification is only available where the mistake is not in the formation of the contract but in its reduction to writing. This is because, as James VC noted in *Mackenzie v Coulson* (1869) LR 8 Eq 368 at 375: 'Courts … do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts.' As a result, for example, in *Baird v BCE Holdings* (1996) 40 NSWLR 374, rectification was refused because there was no mistake in the way the parties' agreement had been written up; the only mistake was in their misunderstanding of its taxation consequences.

The aim of rectification, therefore, is simply to make the written document an accurate reflection of what the parties actually agreed and, for that reason, it can be ordered even where the parties' written agreement contains an 'entire agreement' clause: see *MacDonald v Shinko Australia Pty Ltd* (above) at 155 per McPherson J:

> 'Indeed, it may well be impossible for the parties by means of any contractual provision, however artfully drawn, to escape the court's jurisdiction to order rectification in a matter calling for its exercise'.

See also Davies JA at 156:

> 'The purpose of [the entire agreement] clause … is to exclude … evidence either to prove terms additional to or different from the written instrument or collateral contracts or to construe the instrument in a way different from the meaning to be inferred solely from its terms. But to seek the equitable remedy of rectification is not to do any of those things. Equitable relief for common mistake, whether by way of rescission or rectification of a written contractual instrument, is based on unconscionability; that it would be unconscientious of the party relying on the written instrument, to rely on it in the circumstances … And it would generally be unconscientious of the party relying on the written instrument of contract to rely on it if it had been executed by the parties under the mistaken belief that it recorded the oral contract which they had made or their continuing common intention'.

However, orders for rectification are not given lightly and the normal conditions must be satisfied (prior complete agreement or continuing common intention, literal disparity between the document and what was agreed, clear evidence of mistake, the proposed rectification must be capable of

expression in clear, concise terms and there must be no other bar to the order). As the High Court noted in *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [33]-[35]; (2005) 218 CLR 471 at [33]-[35]:

> The parol evidence rule, the limited operation of the defence of non est factum and the development of the equitable remedy of rectification, all proceed from the premise that a party executing a written agreement is bound by it. … [T]his is not a time to ignore the rules of the common law upholding obligations undertaken in written agreements. It is a time to maintain those rules. They are not unbending. They allow for exceptions. But the exceptions must be proved according to established categories. The obligations of written agreements between parties cannot simply be ignored or brushed aside.

Effect of Entire Agreement Clauses on Promissory Estoppel (and Equitable Estoppel generally)

While there were a number of early authorities to the effect that a plea of promissory estoppel could not 'outflank' the application of basic contractual rules by preventing a defendant from denying the existence and enforceability of some other agreement between the parties[18] others seem to have favoured the alternative views that McHugh JA expressed in *State Rail Authority of New South Wales v Heath Outdoors Pty Ltd* (1986) 7 NSWLR 170 at 193 where, in dealing with equitable estoppel, his Honour forcefully rejected that limitation on doctrines that were based on unconsionability.

His views were followed by Rolfe J in *Whittet v State Bank of NSW* (1991) 24 NSWLR 146, 151-52, and by Higgins J in *Liangis Investments Pty Ltd v Daplyn Pty Limited* (1994) 117 FLR 28 at [41]-[53]. Thomas J in *Grace v Peter Harrison Designs & Signs Pty Ltd* [1998] QSC 27 did not decide the issue but said that he also was inclined to favour McHugh JA's views.

McHugh JA's general line of reasoning would seem to be more aligned with the treatment of other pleas based on unconscionability, such as the availability of rectification to give effect to pre-contractual communications between the parties (see above) and which resulted in Allsop J (with whom Drummond and Mansfield JJ agreed) noting in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at [446], after referring to McPherson JA's order for rectification in *MacDonald v Shinko Australia Pty* Ltd:

> 'it is difficult to see why another remedy of equity based on unconscionability and equally arising out of pre-contractual communications should be defeated by a common law rule about the

[18] As they were listed in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at [444] they included McLelland J judgments in *Johnson Matthey v AC Rochester Overseas* at 196, and in *Bentham v ANZ* (unreported, Supreme Court of NSW, 26 June 1991); *Australian Co-Operative Foods v Norco Co-Operative* at 279 per Bryson J; *Skywest Aviation Pty Ltd v Commonwealth* (1995) 126 FLR 61, 102-106 per Miles CJ *and Public Trustee for the ACT v Megic* (1995) 59 FCR 165 at [36] per Miles CJ and *New Holland Mining v Weaver Oil and Gas Corporation Australia Ltd* (unreported, Supreme Court of WA, 12 March 1998 per Wheeler J). In addition Kirby P, expressly reserved his opinion on the matter, though expressed doubts about allowing estoppel to undermine contracts in that way in *State Rail Authority of New South Wales v Heath Outdoors Pty Ltd* (1986) 7 NSWLR 170 at 172 and 177. In *Seabridge Australia Pty Ltd v JLW* (1991) 29 FCR 415 at 421 Beaumont J also recognised reasons of both principle and policy why courts should not permit the stability of commercial relationships and dealings to be threatened by reliance on oral statements and repeated those concerns in *Cafdawn Pty Limited v Waltons Stores Ltd* (unreported, Federal Court of Australia, 28 March 1991). In *Byers v Dorotea* (1986) 69 ALR 715, 723-25 Pincus J also applied what he saw as the settled law in Queensland to like effect. See also Finn 'Equitable Estoppel', *Essays in Equity* (1985) at 94.

construction of documents' (though his Honour did then go on to note that, given his views about the proper construction of the clauses in question, it was 'unnecessary to decide this question').

It also finds support in a number of other more recent cases including *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 where Campbell JA said at [554]:

> An '*entire agreement clause*' might create a factual difficulty in the way of proof of the elements of equitable estoppel, most obviously, proof of inducement or reliance, and I would not want to rule out the possibility that it might be relevant to any precise remedy granted (though I cannot at present think of an example of when that might occur). However, it does not create an insuperable obstacle of principle. Consistently with the equitable principle that it will not allow a contract to be an instrument of fraud, equity would not permit an entire agreement clause to stultify the operation of its doctrines.

See also *Caringbah Investments Pty Ltd v Caringbah Business and Sports Club Ltd (in liq)* [2016] NSWCA 165 at [73]:

> Further, as I indicated above, senior counsel for the appellant did not dispute that pre-contractual representations could give rise to an estoppel of the nature of that contended for in the present case, nor did he contend that the entire agreement clause necessarily would prevent such an estoppel from arising. He was correct in doing so: see *Franklins* at [33], [554]; *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; 117 FCR 424 at [444]-[449].

Those views are not, however uniformly accepted. For example, in *Chint v Cosmoluce Pty Ltd* [2008] NSWSC 635 Einstein J noted at [137]-[141] (emphasis added):

> 137 Further, the attempt by Cosmoluce to establish an estoppel on the basis of the Resumption Representation is excluded by the entire agreement clause 19.10 of the Distribution Agreement.
>
> 138 The capacity of an "entire agreement" clause in the nature of clause 19.10 of the Distribution Agreement to exclude an estoppel arising from pre-contractual conduct *has been the subject of a division in the authorities*. …
>
> 141 In my view … the balance of the authorities in the Equity Division of the Supreme Court of New South Wales favours the view that no estoppel based on pre-contractual conduct can be established in the light of an "entire agreement" clause of the kind contained in clause 19.10 of the Distribution Agreement.

Given the express statements of the New South Wales Court of Appeal in *Caringbah Investments Pty Ltd v Caringbah Business and Sports Club Ltd (in liq)* [2016] NSWCA 165 (which did not refer to *Chint*) Einstein J's views in *Chint v Cosmoluce Pty Ltd* should now be treated with a great deal of caution.

However, despite what now appears to be a preponderance of decisions supporting McHugh JA's views, there is no clear universal consensus on the effect of an entire agreement clause on a plea of promissory estoppel (or equitable estoppel generally). At the very least though it seems that, as is the situation with attempts to escape the effect of such clauses because of misrepresentation, implied terms and rectification (among others) it is likely to create problems of 'proof' for the party raising the plea. As Campbell JA put it in *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 at [554]:

> An '*entire agreement clause*' might create a factual difficulty in the way of proof of the elements of equitable estoppel, most obviously, proof of inducement or reliance, and I would not want to rule out the possibility that it might be relevant to any precise remedy granted (though I cannot at present think of an example of when that might occur). However, it does not create an

insuperable obstacle of principle. Consistently with the equitable principle that it will not allow a contract to be an instrument of fraud, equity would not permit an entire agreement clause to stultify the operation of its doctrines.

Effect on Entire Agreement Clauses on Interpretation of the Contract

While an entire agreement clause might effectively preclude a court from enforcing rights, duties and obligations that do not appear in the contract but which could be found in earlier documents or discussions, it may not necessarily prevent the court, in cases of ambiguity, from using those earlier sources to interpret what the parties meant by the words in their final document. Internationally, such practices are in fact expressly provided for in UNIDROIT Art 2.2.17 which reads:

> '[a] contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing'.

That, however, is subject to the Australian rule regarding the effect of ambiguity, laid down in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352 – in words subsequently approved by the High Court in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 (emphasis added):

> The *true rule is that evidence of surrounding circumstances* is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it *is not admissible to contradict the language of the contract when it has a plain meaning*.[19]

Should the parties wish to ensure that the courts cannot use prior evidence or statements for that purpose they must expressly provide that that is not their intention. A suitable clause could read:

> 'In the interpretation of this contract reference shall not be had to any prior statements or agreements between the parties.'

Effect of Entire Agreement Clauses on Post-contractual Variation and Waiver

As indicated at the commencement of this paper a proferens can lose the benefit of an entire agreement (and/or non-reliance) clause by subsequent statements or conduct indicating that he or she has waived the benefit of the entire agreement clause. See, again, *Globe Motors Inc v TRW Lucas Variety Steering Ltd* [2016] EWCA Civ 396, *Watford Electronics Ltd v Sanderson CFL Ltd* and *SAM Business Systems Ltd v Hedley & Co* [2002] EWHC 2733; [2003] 1 All ER (Comm) 465.

The same risk attaches if it can be shown that there has been a subsequent variation of the contract which may be enforceable in its own right. See, for example, *Hotel Aida Opera SARL v Golden Tulip Worldwide BV* [2004] EWHC 1012 where Michael Harvey QC sitting as a Deputy Judge of the High Court noted, at [90]-[91]:

> 90. However, an entire agreement clause in the terms of Clause 21.1 will not preclude a subsequent variation of a concluded agreement.

[19] See also *Western Export Services Inc v Jireh International Pty Ltd* (2011) 86 ALJR 1 at [3].

91. It is therefore necessary to determine whether the letter was signed by Mr Lautier before or after the formal contract was concluded. If the letter was signed after the contract was concluded, and if (contrary to my conclusion in paragraph 85) the letter was intended to have contractual effect, it could operate as a variation of the contract.

Unfair Contract Terms Legislation

Perhaps the greatest challenge to entire agreement clauses though comes from the unfair contracts terms legislation. This challenge comes not only from the provisions in the Australian Consumer law but also from other state based legislation such as the *Contracts Review Act 1980* (NSW).

Nor is this a phenomenon unique to Australia. Similar issues have been raised in the UK, as illustrated by the decision in *Watford Electronics Ltd v Sanderson CFL Ltd*, a case argued in part on the effect of s 11 of the *Unfair Contracts Act 1977* (UK) (though, on the facts of that case, the clauses in question were not held to be 'unreasonable' in terms of that section and, therefore, were not void).

In Australia Part 2-3 of Ch 2 of the *Australian Consumer Law* (*Australian Consumer Law*, ss 23 – 28) regulates unfair contract terms.[20] It applies to unfair terms in both 'standard form' consumer contracts and, since 12 November 2016, unfair terms in 'standard form' small business contracts: s 23(1).

Standard form contracts are those that are normally imposed by the party in the stronger bargaining position on a 'take it or leave it' basis with little or no scope for the other party to negotiate terms. Such contracts are susceptible to abuse – because they lend themselves to the inclusion of 'unfair' terms such as exemption, entire agreement and non-reliance clauses that have not been 'truly' agreed by the parties'.

The critical considerations are whether the terms are included in a 'standard form contract', whether that contract is either a 'consumer contract' or a 'small business contract' and whether the terms are themselves 'unfair'.

Section 27(2) provides that, in determining whether a contract is a standard form contract, the court may take into account such matters as it thinks relevant, *but it must take into account*:

(a) whether one of the parties has all or most of the bargaining power relating to the transaction;

(b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;

(c) whether another party was, in effect, required either to accept or reject the terms of the contract (with three limited exceptions) in the form in which they were presented;

(d) whether another party was given an effective opportunity to negotiate the terms of the contract (other than the three limited exceptions);

(e) whether the terms of the contract (other than the three limited exceptions) take into account the specific characteristics of another party or the particular transaction; and

[20] There are equivalent provisions in Div 2 of Pt 2 of subdiv BA of the *Australian Securities and Investments Commission Act 2001* (Cth) governing unfair contract terms in relation to the provision of financial products and services.

(f) any other matter prescribed by the regulations.

"Consumer contracts", for the purposes of the provisions, are contracts for a supply of goods or services, or a sale or grant of an interest in land to an individual who acquires the goods, services or interest wholly or predominantly for personal, domestic or household use or consumption: see s 23(3).

"Small business contracts", for the purposes of the provisions, are contracts for a supply of goods or services, or a sale or grant of an interest in land where, at the time of contracting at least one party is a business that employs fewer than 20 people and either the upfront price payable under the contract does not exceed $300,000 or the contract has a duration of more than 12 months and the upfront price does not exceed $1,000,000: s 23(4).

Under s 24(1) a term will be 'unfair' if:

(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and

(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

Section 24(2) goes on to provide that in determining whether a term is unfair the court may take into account such matters as it thinks relevant, *but must take into account* both the extent to which the term is transparent (that is, expressed in reasonably plain language, legible, presented clearly and readily available to any party affected by the term) and the contract as a whole.

Section 25 then provides a non-exhaustive set of examples of terms which it says 'may be unfair'. They include (inter alia):

(k) terms that limit, or have the effect of limiting, one party's right to sue another party;

(l) terms that limit, or have the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;

(m) terms that impose, or have the effect of imposing, the evidential burden on one party in proceedings related to the contract.

If a term in a standard form consumer or small business contract is unfair, s 23(1) provides that it is void.[21] This need not necessarily terminate the contract as a whole if the unfair term can be severed – and this is reflected in s 23(2), which provides that 'the contract continues to bind the parties if it is capable of operating without the unfair term – though the term itself is void ab initio. Such terms are therefore also likely to be held to be void in all identical contracts and, in appropriate cases, the courts have power to declare them to be void in all such contracts: see *ACCC v Chrisco Hampers Australia Ltd* (2015) 239 FCR 33.

Clearly in appropriate cases (where an entire agreement or non-reliance clause is included in a standard form consumer or small business contract) the unfair contract terms legislation can negate

[21] Sections 12GND and 12 BF of the *Australian Securities and Investments Commission Act 2001* (Cth) contain equivalent provisions in relation to unfair terms in contracts for the provision of financial products and services.

the effect of those clauses by rendering them void, with the effect that the contract can them be enforced without them – opening the door to the admission of other extrinsic evidence.

In at least one case, action by ASIC has gone even further[22] and has convinced the big four banks to remove entire agreement clauses from their small business loan contracts on the basis that they were unfair and therefore non-compliant with the *ASIC Act's* unfair contract terms provisions: see ASIC Report 565, *Unfair contract terms and small business loans*, March 2018. From the point of view of those banks the effect is that they will no longer be able to absolve themselves 'from any contractual responsibility for conduct, statements or representations that the lender's staff may have made to small business borrowers about how the contract would operate (eg how the bank would exercise its discretions during or on review of the loan)'.[23] The Report goes even further and notes under 'Next steps' that ASIC 'will also conduct a review of small business loan contracts from other lenders, including bank and non-bank lenders to ensure that their small business contracts do not contain unfair terms'.[24]

The risk that such clauses may negated under the unfair contract terms provisions is therefore very real and clauses either have to be rewritten or, better, removed from the scope of the legislation by ensuring that the contracts in which they are contained have been independently negotiated and are not within what the legislation regards as a standard form contract.

Conclusion

Entire agreement clauses were included in contracts (and were accepted and enforced by the courts) to reinforce the parol evidence rule, to provide a level of certainty about the parties' obligations and to prevent unnecessary (and unmeritorious) litigation. Their scope and effectiveness has, however, been reduced by decisions that have challenged (and limited) their application in a broad range of situations including those involving allegations of misrepresentation, mistake, other vitiating elements, implied terms, promissory estoppel and collateral contracts. The introduction of unfair contract terms legislation has further eroded their potential effectiveness and has given potential plaintiffs an additional ground on which to challenge them.

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[22] Perhaps surprisingly, the ACCC seems not to have concerned itself with the possibility that entire agreement or non-reliance clauses might be a concern. Certainly, the only reference to them in any of its published documents is a brief reference in its November 2016 document *Unfair terms in small business contracts: A review of selected industries,* where, under the heading 'Misleading statements about rights at law' in the section of the report dealing with its review of 'Independent Contracting' it notes its concern that such clauses 'could mislead a sub-contractor in instances where they may have additional rights at law (for instance based on pre-contractual representations made by the larger business). Having said that it then went on to relate the one instance where it obtained remedial action, saying: 'One agreement contained a clause which stated that the contract between the business and the subcontractor superseded all previous agreements, undertakings and communications, whether written or oral, between the parties. The ACCC considered that this clause could represent an incorrect or misleading statement about a subcontractor's rights at law, and in particular may give the false impression that a subcontractor cannot rely on any pre-contractual representations made by the business. The business agreed to amend the clause to read that the agreement superseded all previous written agreements. Following this amendment, subcontractors are less likely to be misled about their rights, including their ability to rely on oral representations made by the business prior to the agreement being signed.' The ACCC seemed satisfied with that modification.

[23] ASIC Report 565, Unfair contract terms and small business loans, March 2018, para [30]. It might be expected, following the removal of such clauses from their small business loan contracts that the big four banks will also remove them from their consumer contracts.

[24] Ibid Part C 'Key points' (though in para 89, under the heading 'ASIC monitoring and follow-up work' the Report merely says that '[ASIC] *may* also undertake further work to examine small business loan contracts from other lenders to ensure that these contracts do not contain unfair terms').

So is there any point anymore in including them? The answer is 'probably, yes'. Entire agreement clauses have a distinct and valuable role to play in commercial transactions in reducing the potential for disputes and litigation.

The problem has been, as with many contractual devices which started life with honest intent, that they have been abused. However, if the proferens is upfront with his or her customers about the existence, extent and effect of any entire agreement (and/or non-reliance) clause at the point of contracting and if the customer is prepared to contract on that basis (or to pay a higher price to compensate for the additional risk that removing that term may involve for the proferens[25]) there should be no insurmountable objection in principle to the inclusion of such clauses – and no valid reason why they, as a species of 'contractual term', should be universally regarded as 'unfair'.

That also aligns with the High Court's view that commercial contracts, in particular, are to be interpreted in a businesslike fashion taking into account not only the words the parties used but also the circumstances in which they reached their agreement and the commercial purpose or objects that they intended to achieve: see, generally, *Electricity Generation Corp v Woodside Energy Ltd* (2014) 251 CLR 640 at [35]

If that is not to be the case however, the lawyers will simply have to be more particular in how they word and present such clauses. As has been seen throughout this paper the courts have consistently found that entire agreement clauses (and/or non-reliance clauses) can effectively preclude parties from successfully bringing actions based the alleged presence of misrepresentation, mistake, implied terms, or promises given in circumstances sufficient to create an estoppel, *provided the clauses are worded sufficiently* to encompass (and negate) such actions. There is no reason why such clauses should not continue to be effective both in contracts generally and even in consumer and small business contracts (*provided the contracts in which those clause are included* are not structured as what the legislation defines as a 'stand form contract').

Therefore, are entire agreement clause dead? No – but boilerplate entire agreement clauses probably are, at least in consumer and small business contracts.

[25] See, again *Watford Electronics Ltd v Sanderson CFL Ltd* [2001} EWCA Civ 317 at [54]-[56].